NOVEMBER 1, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard Set to Issue Imminently

By Conn Maciel Carey LLP's COVID-19 Task Force

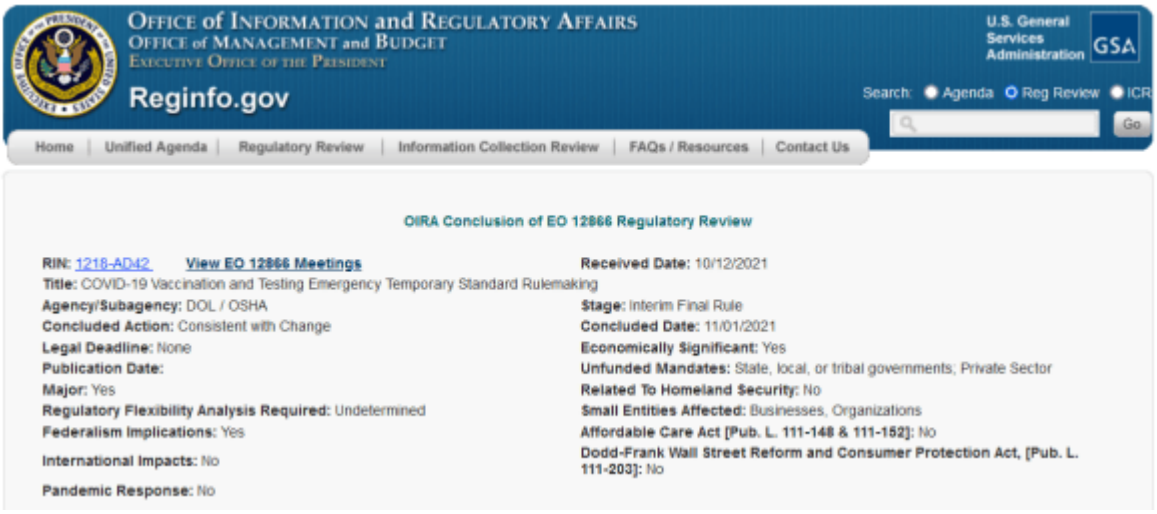
OSHA's COVID-19 Vaccination and Testing emergency temporary standard is expected to be released imminently, likely Wednesday or Thursday of this week.

OMB Has Concluded Its Review of the ETS:

This morning, OMB's website updated again, but this time, it was not to add more EO 12866 stakeholder meetings to the calendar, it was to declare OMB's review of the ETS "concluded." Here are two screenshots from OMB's website. The first shows the list of active DOL rulemakings at OMB for some form of review, and it identifies the status for the COVID-19 vaccination and testing ETS as "Concluded."



The second one provides a little more detail, including these notes about the ETS: "Received Date: 10/12/2021" and "Concluded Date: 11/01/2021."



The Dept. of Labor Gives Some Clues About What to Expect in the ETS:

Additionally, a Department of Labor spokesman shared this statement this morning:

"On November 1, the Office of Management and Budget completed its regulatory review of the emergency temporary standard. The Federal Register will publish the emergency temporary standard in the coming days. [OSHA] has been working expeditiously to develop an emergency temporary standard that covers employers with 100 or more employees, firm- or company-wide, and provides options for compliance.... Covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, unless they adopt a policy requiring employees to choose either to get vaccinated or to undergo regular COVID-19 testing and wear a face covering at work. The ETS also requires employers to provide paid time to workers to get vaccinated and paid sick leave to recover from any side effects."

The DOL statement provides some useful insight about what will be in the final rule and when we will see it. First, OSHA did stick with the 100-employee threshold that the President identified in his announcement and new COVID-19 Action Plan from September 9th. There was always a chance that OSHA would scrapped that employee-count trigger as they wrote the rule and instead made it apply to everyone. We also see in this DOL statement that, as expected, the 100-employee count will be company-wide, not establishment-by-establishment. It is also becoming more clear that the ETS will not prohibit employers from implementing a "hard" vaccine-mandate, if they choose to, but it will provide for the testing option, as well. Additionally, where it reinforces that employers will be required to pay for employee time getting vaccinated or recovering from the vaccines, the statement is silent about payment for testing. Of course, that does not mean employers will not be required to also pay for time testing; however, a rumor we have been hearing that employers will not be required to do so, and the absence of a reference to that employer-payment requirement in this statement gives some credence to that rumor.

A New Face Covering Requirement:

The statement also provides insight into a face covering element of the rule. Specifically, it appears that there will be a potential requirement for employers to require face coverings, most likely just for those employees who decline to get vaccinated (or decline to share their vaccination status with the employer). In this sense, it appears OSHA is going all in on the holy trinity of COVID-19 hot buttons – vaccination, testing, and masks.

There could be significant implications, both helpful and harmful, of a mask requirement in the ETS. First, if face coverings become mandatory under a regulation, it is possible (likely) employers will be required to pay for the masks, and will certainly be required to ensure they are worn and worn correctly. If the face coverings are only required for unvaccinated workers, that will force employers who may have intended not to wade into the vaccination side of the rule (i.e., to just provide testing without asking employees about their vaccination status), to either verify vaccination status or require masks for everyone.

Alternatively, assuming the ETS does not expressly require masks for vaccinated workers, this would open the door to many employers who would like to permit vaccinated employees to go without masks, but have been reluctant to do so because of the current CDC guidance. It may also make it harder for OSHA to issue General Duty Clause citations related to other CDC and OSHA recommended administrative and engineering controls. That is, since OSHA would now have a broadly applicable general industry regulation that addresses three particular COVID-19 controls – vaccination, testing, and face coverings – it would be harder to support a GDC violation for not enforcing distancing or cleaning or working on ventilation systems, etc. Indeed, OSHA may even be preempted from trying to cite under the GDC for other COVID-19 controls because there would now be an applicable, specific regulation that lays out specifically how employers can effectively mitigate spread of COVID-19 in the workplace, and that could "clear the field" for other enforcement.

When Will We See the ETS?:

Finally, the DOL statement and other circumstances tells us a little more about when we can expect to see the final ETS. It appears that the ETS will not be revealed today; rather, we will see it "in the coming days." It appears that the Administration is holding the ETS until after the polls close tomorrow afternoon where there are meaningful elections, particularly the Governor's race in Virginia, to try to minimize political blow-back from a potentially unpopular regulation. So it is likely that the pre-publication package will be revealed either tomorrow night (Tuesday, November 2nd) or the next day, with the rule published in the Federal Register likely by the end of this week or early next week.